No. 253 (23)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

314-646

IN THE MATTER OF

PARKWAY KNITTING MILLS, INC.,
Bankrupt,

ELSTELNAT HOLDING CORPORATION,
Petitioner,

AARON L. PALMER, Trustee in Bankruptcy of Parkway Knitting Mills, Inc.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND A BRIEF IN SUPPORT THEREOF

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND A BRIEF IN SUPPORT THEREOF

The petitioner, Elstelnat Holding Corporation, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review an order of that Court, dated June 2, 1941, which affirmed an order of the United States District Court of the Eastern District of New York.

Matter Litigated

On June 19, 1939, the bankrupt executed a chattel mortgage, to the petitioner as mortgagee, to secure the repayment of the sum of $1,800.00. Copies thereof were filed in the office of the Register of Kings County on June 20, 1939 and May 21, 1940. The copy which was refiled on May 21, 1940, bore an endorsement to the effect that a balance of $900.00 was still due thereon (R. 15-16).

Thereafter a voluntary petition in bankruptcy was filed by the mortgagor on September 3, 1940. At that time it owed to the petitioner $700.00, with interest thereon from June 19, 1939. On a motion for an order to direct the trustee to pay that balance, out of the proceeds realized from the sale of the mortgaged chattels, the trustee attacked the validity of the petitioner's lien on the ground that the refiling of May 21, 1940 was not in accordance with the provisions of the Lien Law of New York (R. 7).

Decisions of Courts Below

All of the three tribunals have held that the petitioner lost his lien. But none of them completely approved the views of the tribunal immediately preceding. Thus, Referee McDonald took the position that the mortgage was "void" on the ground that (a) it was not refiled on time, and (b) that the renewal statement "failed to indicate the time and place where the original mortgage was filed" (R. 8, 13). Judge Campbell overruled Referee McDonald on (a) the untimeliness of refiling, but sustained him on (b) the insufficiency of the statement endorsed on the refiled copy (R. 17).

The Circuit Court of Appeals, on the other hand, seemingly saw merit in the petitioner's contention that the refiling was in accordance with the alternative procedure provided by subdivision 2 of Section 235 (R. 29). However, it affirmed the decision of the lower court, nevertheless. It did so in reliance upon a statute not hitherto raised in the briefs—Section 233 Lien Law—and upon the false assumption that that statute was not complied with. A petition for rehearing was denied.

Reasons for Granting Writ

It is the petitioner's profound belief that the judgment of the courts below deserves a review by the Supreme Court for the following reasons:

1. The gravamen of the case at bar is the converse of the case envisaged by subdivision 5(a) of Rule 38. In the case at bar federal courts have decided a state "question of substance" not theretofore determined by the state's court of last resort. Technically, therefore, the issue does not present a question under Rule 38. Morally, however, the Supreme Court may well, in the exercise of its discretion, consent to review the decision. As it is impossible to carry an appeal to the New York Court of Appeals, the Supreme Court is the only judicial authority in a position to reverse the erroneous interpretation of the state law by the federal courts.

2. The decisions of the courts below are in direct contravention of the clear purport of the statutes involved. They are, therefore, clearly in conflict with what would have been the decision of the New York Courts. (Though the statutory provision has been in effect since 1897, petitioner could not find a single decision.) This case, therefore, falls within the category mentioned in subdivision 5(b) of Rule 38.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HERMAN A. BENJAMIN,
Attorney for Petitioner.

June 30, 1941

BRIEF

Opinions Below

The opinion of Referee McDonald is printed on page 8 of the record. The opinion of Judge Campbell is reported in 36 Fed. Supp., 299-302 and is reprinted on pages 15-20 of the record. The opinion of the Circuit Court of Appeals is reported in 119 F. 2nd, 605-7, and is printed at pages 27-~~30~~ 28 of the record.

Jurisdiction

The jurisdiction of this Court is based on section 240(a) of the Judiciary Code, which is Title 28 United States Code, Section 347.

Statement of Case

The sole issue litigated in the courts below was the validity of a chattel mortgage executed by the bankrupt. That hinged solely on whether the mortgagee complied fully with the provisions of the New York Law as to filing and refiling.

The mortgage was executed June 19, 1939 (R. 3, 15). A copy thereof was filed in the office of the Register of Kings County on June 20, 1939, and another copy was refiled on May 21, 1940 (R. 3, 15). The refiled copy bore the following endorsement:

> "RENEWAL STATEMENT
>
> *Elstelnat Holding Corp.* The mortgagee within *named, does* certify and state that there remains due and unpaid on the mortgage, of which the foregoing is a true copy the sum of *Nine Hundred ($900.00)* Dollars *with interest* from the *19th* day of *June,* 1939, and

this copy and statement are filed to continue the notice required by the statute made and provided for the renewal of chattel mortgages.

Dated this *20th* day of *May, 1940.*

ELSTELNAT HOLDING CORP.

by JACK SHANE, Pres.,
Mortgagee."

A voluntary petition in bankruptcy was filed by the mortgagor September 3, 1940. By that time the principal and accrued interest still due on the mortgage was $750.73 (R. 16).

On the motion to direct the trustee to pay that sum out of the proceeds realized from the sale of the mortgaged chattels, the trustee's opposition was predicated on the alleged failure on the part of the mortgagee to comply with Section 235 of the New York Lien Law (R. 7).

As set forth in the petition (page 2, *supra*), the courts below sustained the trustee's objection, though on different grounds. In the argument that follows we shall attempt to give a clear and concise analysis of those opinions and point out the errors that each of the courts below has fallen into. At this stage, we respectfully maintain that—

Specification of Errors

1. The District Court erred in holding that the renewal statement endorsed on the copy of the mortgage filed May 21, 1940, did not fully comply with the provisions of Section 235 of the Lien Law. That error lay in the Court's failure to note that the two subdivisions of the section provide for two alternative methods and that the petitioner followed the method contained in subdivision 2.

2. The Circuit Court of Appeals erred by attempting to tack on to the requirements of Section 235 the entirely irrelevant provisions of Section 233 of the same law—

especially when that section was in fact complied with by the Register, and when the appellee nowhere questioned such compliance or raised that point.

3. The Circuit Court of Appeals further erred by assuming that in the case at bar the Register of Kings County failed to do his duty, when nothing contained in the record before that court permitted such an inference and when, as the petition for a rehearing showed, the requirements of section 233 were in fact completely fulfilled (R. ~~33~~, Point II of petition for rehearing). 3/

Argument

It is our contention that the mortgagee's lien was as valid for the year following May 21, 1940, as it concededly was during the year following June 20, 1939. We hold that view, because we believe that—

1. The renewal statement endorsed on the copy filed May 21, 1940, fully complied with the alternative method provided by subdivision 2 of section 235 of the Lien Law.

2. Section 233 of the Lien Law, relied on by the Circuit Court of Appeals as ground to sustain the decision of the district court, has no bearing on the provisions as to refiling.

POINT I

The renewal statement endorsed on the copy filed May 21, 1940, fully complied with the alternative method provided by subdivision 2 of section 235 of the Lien Law.

The learned District Court, in quoting section 235 of the Lien Law limited himself to subdivision 1—stopping short before the disjunctive particle "or" that separates it

from subdivision 2 (R. 16-17). Undoubtedly, had the section been limited to the portion there quoted, the renewal statement would have been insufficient. But the renewal statement was sufficient under subdivision 2. The pertinent portions of the entire section are printed in Appendix, page 14, *infra*.

Obviously, the *or* separating the two subdivisions signifies that the Legislature intended to give to the mortgagee the choice between two alternative methds of giving notice to the world of the existence of his lien. For *or* is a disjunctive particle, offering "an election to do one of two things" (*Bouvier's Law Dictionary*, Third Edition, page 2422. See also *Smith* v. *Farley*, 155 App. Div. 813, 815; *International Merchantile Marine Co.* v. *Lowe*, 83 Fed. 2nd [C. C. A. 2] 663, 665).

Indeed, the evolution of the law permits no other interpretation but that the *or* joining the two subdivisions accords to mortgagees the choice between two distinct methods for the perpetuation of their liens. Section 3 of chapter 279 of the Laws of 1833 provided for the refiling of a copy of the mortgage "together with a statement exhibiting the interest of the mortgagee." (See Appendix, p. 13, *infra*.) Chapter 501 of the Laws of 1873 and chapter 418 of the Laws of 1879 effected some minor amendments only. But in 1895 the Legislature so amended the section as to eliminate entirely the requirement for the filing of a copy of the mortgage and provided instead for the filing of "a statement describing such mortgage, stating the names of the parties, the time when and the place where filed, and exhibiting the interest of the mortgagee in the property" (chapter 554, Laws of 1895. See Appendix, p. 13, *infra*).

It was while that law of 1895 was in effect that the only two cases insisting upon the time-when-and-place-where statement were decided. They are *Stevenson Brewing Co.* v. *Eastern Brewing Co.*, 22 App. Div. 523, affd. 165 N. Y. 634 and *McCrea* v. *Hopper*, 35 App. Div. 572, affd. 165 N. Y. 633.

In the Stevenson Brewing Co. case the Appellate Division of the second department declared, at page 524:

> "* * * Within due time, and on the 30th day of April, 1895, a copy of the mortgage, with a statement of the amount remaining due upon it, was filed in the office of the Register of Kings County, the proper office. This was a substantial compliance with the statute as it existed prior to the 18th day of that month. But the provisions of the later statute were not observed in that there was no statement filed of 'the time when and place where' the mortgage was filed. This is thus made an essential part of the statement, because it is required by the statute, which must be quite strictly observed in all cases coming within it to continue the validity of a mortgage as against the creditors of the mortgagor. (Ely v. Carnley, 19 N. Y. 496.)"

And in the McCrea case, the Appellate Division of the first department, after referring to chapter 354 of the Laws of 1895, declared at page 575:

> "* * * The indorsement was not a statement at all. Certainly not such a statement as is contemplated by the amendatory act. The facts required to be stated are thereby left to mere inference. If the plaintiffs' contention were correct the amendment practically left the law as it was. It is clear, however, that a change was intended and that Hopper failed to comply with the new requirements. The statute must be strictly observed if the validity of the mortgage, as against creditors and subsequent purchasers or mortgagees in good faith, is to be maintained" * * *.

Thus, each of those decisions was predicated on the provisions of the law that came into effect on April 18, 1895, namely, Chapter 354 Laws of 1895. On the merits, each of those decisions was just and reasonable. But neither of those cases may be cited as authority for the law now in effect: for by the time the McCrea case reached the Appellate Division the Legislature enacted a comprehensive new Lien Law (Chapt. 418, Laws of 1897). It was en-

titled, "An Act in relation to liens, constituting chapter forty-nine of the general laws". Sec. 95 of that law related to refiling. It was substantially the same as section 235 of the present Lien Law (See appendix, p. 13, *infra*).

Subdivision 2 of each of those sections is in effect a re-enactment of the law as it prevailed since 1833—requiring the refiling of a copy of the mortgage, with a statement showing the interest of the mortgagee in the chattels. The only reasonable inference permissible is that the Legislature, after experimenting for two years with a law requiring the filing of statements only, decided to re-enact the old provision—at least as an alternative method. And one may well venture the guess that the method authorized by subdivision 2 is, with very rare exceptions, the only method followed.

That method requires, as far as New York City is concerned, the filing in the office, "where the original mortgage or a copy thereof was filed" of "a copy of such mortgage * * * with a statement showing the interest of the mortgagee." Exactly that was done in the case at bar. Hence, the petitioner's lien on the chattels for the year commencing June 20, 1940, remained as effective as it was during the first year; and that lien applied with equal effect to the proceeds realized from the sale of the mortgaged chattels. Because of that the petitioner's motion should have been granted.

POINT II

Section 233 of the Lien Law relied on by the Circuit Court of Appeals as ground to sustain the decision of the District Court has no bearing on the provisions as to refiling.

Section 233 of the Lien Law is clear and unambiguous (See appendix, p. 15, *infra*). It is entitled, "filing and entry" and prescribes the duties of the public officials entrusted with the custody of chattel mortgages. Aside from the provision for an alphabetical indexing all such documents, it requires that he endorse on each document "its number and time of its receipt".

Nowhere in that section will be found even a hint that it applies only to refiled mortgages. Yet, the Circuit Court of Appeals chose to assume that this "endorsement" of the number and time of receipt is the same "endorsement" that is referred to in subdivision 2 of section 235 (R. 29-30) and it assumed that such endorsement was lacking on the refiled copy.

Of course, the assumption of fact was as unwarranted as it was erroneous. Under Point II of our petition for a rehearing* we showed that the copy on May 21, 1940, was properly endorsed by the Register. The fact that the trustee was able to locate it for examination is the best evidence that it was properly endorsed and indexed: for, otherwise, he would have been unable to locate it. Hence, the assumption to the contrary was unwarranted.

Besides, even if the Register had failed properly to endorse the mortgage, its validity could not thereby be affected. It would certainly be unfair to penalize a mortgagee for the neglect of duty on the part of a public official. In *Southern Dairies, Inc.* v. *Banks*, 92 Fed. 2nd 282 (cert. denied 302 U. S. 761), the Circuit Court of Ap-

*R. ~~33~~ 31

peals of 4th Circuit refused to penalize a grantee for an error on the part of the recording officer in failing enter grantor's name in the "grantor" index. At any ra until the contrary is established, courts may well presme that public officials will perform their duties. But what more important by far, in the case at bar, the burden of the mortgagee are circumscribed by the provisions of ection 235 alone; and those requirements were duly fulfille

A more reasonable interpretation of the word "dorsements" found in subd. 2 would be that it refer to all changes that might become necessary in the course time. For instance, where before the time for refiling, the arties mutually agree to exclude some of the chattels r add others, such changes would have to be endorsed. Silarly, in the City of New York, the refiling must be "in e same office or offices where original mortgage or a copy hereof was filed." Hence, any change of address both of t mortgagor or the chattels would require the endorsemt of a statement to that effect on the refiled copy. And se are the "endorsements" referred to in sec. 235.

Conclusion

The provisions as to filing and refiling containe in the New York Lien Law are simple and unambiguous. erhaps thousands of the same printed renewal statements re filed annually in the offices of the Registers of greatr New York. Yet, except for the two cases decided uler the Law of 1895, counsel could not find a single case were the sufficiency of such renewal statement was questined.

It must be apparent that the district court erred because it overlooked subdivisions 2 of section 235. It nust be equally as apparent that the Circuit Court of Appeds erred in deciding that the "endorsements" mentioned in subdivision 2 of section 235 are the "endorsements" equired to be placed by the Register; and, even more so, in assum-

ing—contrary to fact—that the Register failed to do his duty.

Of course, petitioner may not demand a review by the Supreme Court as of right. But in the case at bar the United States Courts interpreted a local law in a manner that is in direct contravention to the words of the statute and unquestionably in conflict with what would have been the decision of the New York Court of Appeals. As the particular provision of the statute (subd. 2 of Section 235) has never been adjudicated in the New York Courts, despite its existence for over one hundred years, petitioner earnestly prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

HERMAN A. BENJAMIN,
Attorney for Petitioner.

June 20, 1941